

No. 22733 ✓

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JUN 11 1969

SYDNEY N. FLOERSHEIM, an individual  
trading and doing business as  
FLOERSHEIM SALES COMPANY and NATIONAL  
RESEARCH COMPANY,

*See Vol.  
3502*

Petitioner,

VS

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR REHEARING BY PETITIONER  
AND REQUEST FOR HEARING EN BANC

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PETITION FOR REHEARING BY PETITIONER AND  
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STATEMENT OF CASE

Petitioner has heretofore filed with the above  
entitled court a Petition to Review an Order of the  
Federal Trade Commission. The Order of the Federal Trade  
Commission was affirmed on May 28, 1969.

GROUND FOR REHEARING

A rehearing should be granted herein and the decision  
vacated for the following three (3) reasons:

I

The decision, insofar as it holds that there is  
substantial evidence to support the Order of the Federal





Trade Commission, is contrary to the evidence.

## II

The decision is contrary to law insofar as it holds that:

A. The Order of the Federal Trade Commission is not arbitrary, capricious, unreasonable and a denial of due process; and,

B. The Petitioner received adequate notice he was being charged with misrepresenting that a third party, other than the creditor, was interested in the debt.

## III

Substantial legal issues raised by the Petitioner were not considered or were overlooked by the Court.

## ARGUMENT

### I

THE DECISION, INSO FAR AS IT HELD THAT THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE ORDER OF THE FEDERAL TRADE COMMISSION, IS CONTRARY TO THE EVIDENCE.

The decision, at pages 1-3, gives a physical description of the forms sold by the Petitioner. Then, commencing on Page 3, and continuing through Page 6, the decision summarizes or quotes from portions of the Opinion and Order of the Commission. The decision does not state, nor does it discuss, the testimony of witnesses at the hearing with respect to the effect of the forms upon persons receiving them and whether they were deceived or misled as to the true identity of sender, or their purpose. Yet,

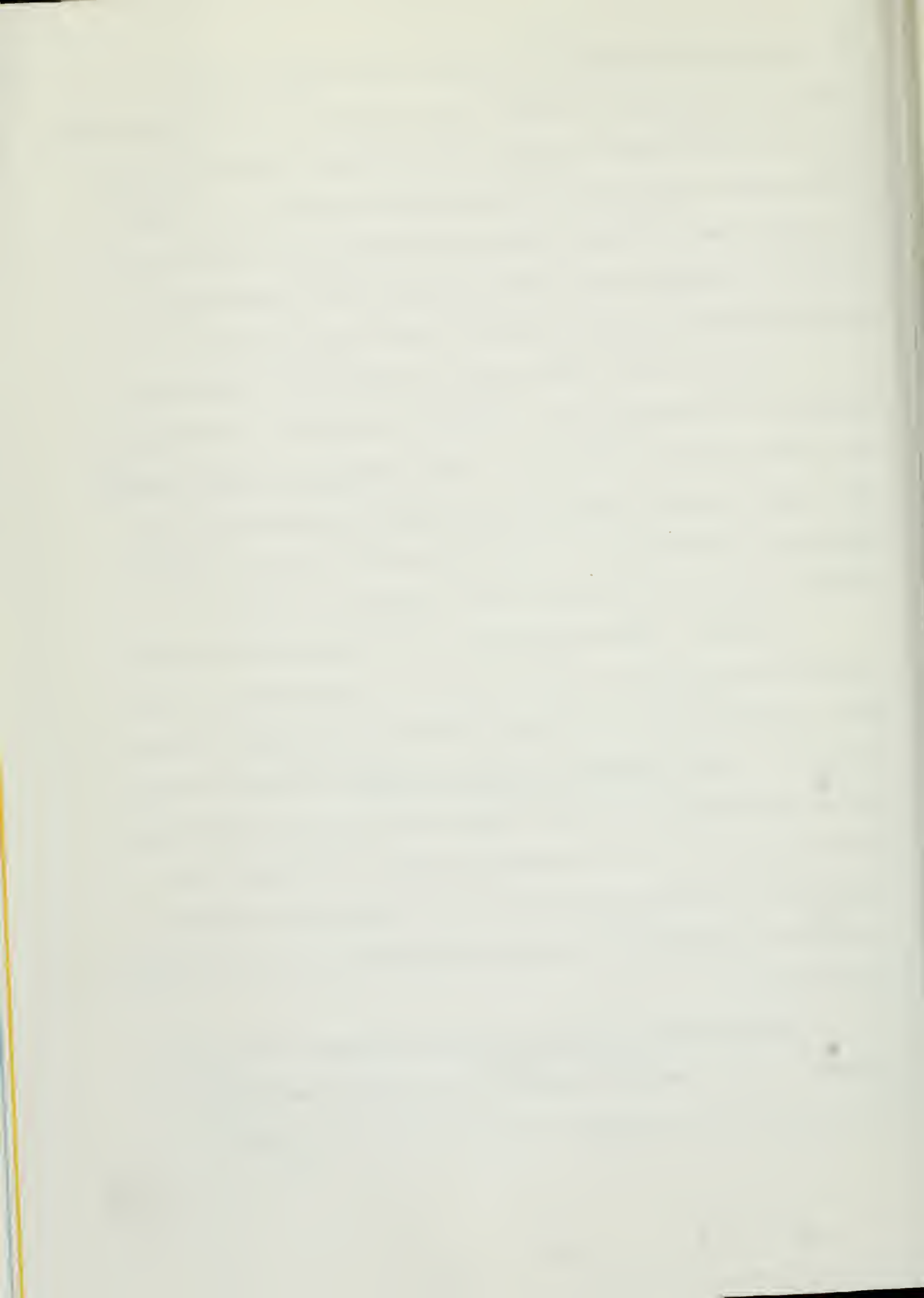


the decision concludes, at page 6, that there is substantial evidence to support the conclusion of the Commission that the Petitioner's forms and envelopes "are misleading, create the impression that they come from the government or some other official source or third party, rather than from the creditor, and that they have the capacity to and tendency to deceive those to whom they are sent."

Forms, or any other type of documents, cannot be deceptive in the abstract. Unless some person is deceived, the forms are not deceptive. The testimony at the hearing was that in reality and in actual use the forms did not deceive. The finding of the Commission is thus erroneous in that there is no substantial evidence to support it.

Further, subparagraph 3c of the Commission's Order requires Petitioner to have printed on any envelope which uses a Washington D.C. return address the identity of the creditor. U. S. Postal Regulation 124.55 provides in pertinent part that any matter which has on its outside label or envelope "..... any language asking for payment of a bill which by its manner or style of display is defamatory and reflects injuriously on the character of the addressee." is libelous.

62 Stat 782, 18 U.S.C. 1718 provides in substance that any such libelous material will not be delivered and that deposit for mailing of such material is a crime.



Thus, if Petitioner takes an assignment of an obligation for collection, being properly licensed to do so, thereby becoming the creditor, the printing of his trade name alone, i.e., "Payment Demand, Inc." on his envelopes might well be considered a violation of the above cited Statute and Postal Regulation. In such a case, compliance with subparagraph 3c of the Order of the Commission might well deprive him of the use of the United States Mail service and subject him to criminal prosecution.

The Commission's Order would also deny the use of the mail and impose possible criminal prosecution on a customer of Petitioner who happened to be in the collection business and had a trade name descriptive of his type of business, such as, e.g., "Overdue Accounts Receivable Collections". This is unreasonable, arbitrary, capricious and a denial of due process of law. It is such because never has it been held that a creditor, himself, could not make every reasonable and lawful effort to collect money due him.

To place the Petitioner or his customers in a position where they are confronted with the alternatives of: 1) violating the Order of the Commission by omitting the name of the creditor; 2) violating the above cited Statute and Postal Regulation by using the name of the creditor and



facing the very real probability that the material will not be delivered and that they might be prosecuted criminally; or 3) not using the mail and thus being de facto put out of business, is certainly the rendering of an unreasonable, arbitrary and capricious order which deprives Petitioner and his customers of their property without due process of law.

## II

### THE DECISION IS CONTRARY TO LAW IN HOLDING THAT:

A. THE ORDER OF THE FEDERAL TRADE COMMISSION IS NOT ARBITRARY, CAPRICIOUS, UNREASONABLE AND A DENIAL OF DUE PROCESS:

As discussed above, the only possible evidence of some momentary deception, was testimony by witnesses which related only to the type of envelope used by the Petitioner. On the other hand, the Order of the Commission went far beyond dealing with the type of envelope used and thus goes far beyond, as the Court stated in its opinion, at page 6, imposing a "remedy.....reasonably calculated to end the deception." The Court implicitly recognized that the Order, at least to some degree was broader than necessary when it stated that the "fact that it may impose more control than essential is not fatal."

However, there is a line beyond which "more control than is essential" is no longer permissible, but is unreasonable, arbitrary and capricious. It is in light of the evidence as stated above, that Petitioner contends that







the Order has crossed that line and is unreasonable, arbitrary and capricious.

B. THE PETITIONER RECEIVED ADEQUATE NOTICE HE WAS BEING CHARGED WITH MISREPRESENTING THAT A THIRD PARTY, OTHER THAN THE CREDITOR, WAS INTERESTED IN THE DEBT.

The Court, in its opinion, stated at page 6, that "we have reviewed the complaint and the hearing and conclude that Petitioner had adequate notice of this charge". While it is true that the complaint could be interpreted to provide sufficient notice, the Court has ignored the fact that Petitioner was told expressly, by the Hearing Officer, that unless the Commission amended the complaint to state clearly a charge relating to alleged misrepresentations that a third party, other than the creditor, was interested in the debt, this charge would not be considered. (See Reporter's Transcript, page 36, lines 1-12). Petitioner was thus affirmatively led to believe that this charge was not in issue, yet, a great portion of the Commission's Order deals directly with the point. (See paragraph 1, 2a, 2c and 3b of the Decision). Unless Petitioner is given notice that he must defend against a charge, the portions of an Order sustaining that charge are void.

### III

SUBSTANTIAL LEGAL ISSUES RAISED BY PETITIONER WERE NOT CONSIDERED OR WERE OVERLOOKED BY THE COURT.

Petitioner adopts by reference all of his arguments under Points I and II in support of his contention that



substantial legal issues raised by Petitioner were not considered or were overlooked by the Court.

REQUEST FOR HEARING EN BANC

Because of the importance of the decision to be reached in this case and the far reaching effect of the Commission's Order, it is respectfully requested and suggested that this case be heard en banc.

DATED: This 8th day of June, 1969.

Respectfully submitted,

JAMES A. SCHMIESING,

Attorney for Petitioner

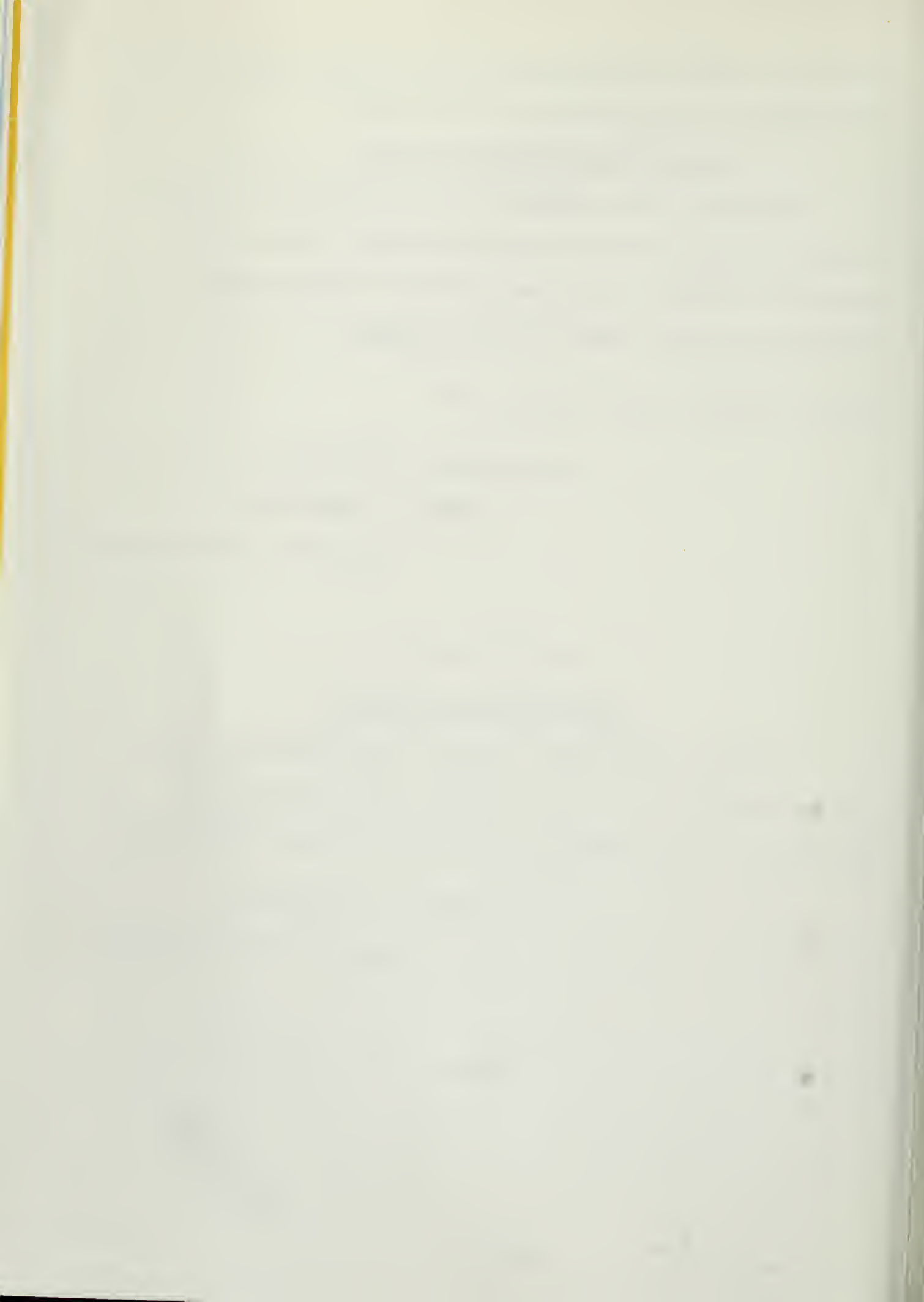
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CERTIFICATE OF COUNSEL

JAMES A. SCHMIESING, counsel for Petitioner, does hereby certify that in his judgment the Petition for Rehearing is well founded and is not interposed for delay.

JAMES A. SCHMIESING,

Attorney for Petitioner



AFFIDAVIT OF MAILING

STATE OF CALIFORNIA    )  
                              )  
COUNTY OF ORANGE       ) ss

I, the undersigned, say:

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 833 Dover Drive - Suite 6, Newport Beach, California, 92660. On June 9, 1969, I served the within PETITION FOR REHEARING BY PETITIONER AND REQUEST FOR HEARING EN BANC, on the following in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Newport Beach, California, addressed as follows:

WILLIAM B. LUCK, Clerk  
United States Court of Appeals - Ninth Circuit  
7th and Mission Streets  
P.O. Box 547  
San Francisco, California 94101    (25 copies)

JAMES McI. HENDERSON, General Counsel  
J. B. TRULY, Assistant General Counsel  
ALVIN L. BERMAN, Attorney  
FEDERAL TRADE COMMISSION  
Washington, D.C. 20580    (3 copies)

DATE: This 9th day of June, 1969.

\_\_\_\_\_  
Claudia D. King

Subscribed and sworn to before me  
on this 9th day of June, 1969.

\_\_\_\_\_  
Notary Public in and for said  
County and State

JAMES A. SCHMIESING

